SUPREME COURT, U. S.

FILED

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1190

KEVIN H. WHITE,
as he is Mayor of the City of Boston, et al.,
PETITIONERS,

v.

TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

The respondents (plaintiffs below) oppose the petition for certiorari of Kevin H. White, as he is Mayor of Boston, the Public Facilities Commissioners of Boston, and the Director of Public Facilities of Boston (the "City petitioners").

Questions Presented

1. Can persons seek certiorari when they were not parties to this case in the District Court until after the appeal period expired, were later joined only for specified purposes not including challenges to the order appealed from, and did not participate in the Court of Appeals?

2. Did both lower courts mistakenly apply the decision and reasoning in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973) to three schools and to vocational programs in other schools?

3. Has *Keyes* been overruled by *Milliken* v. *Bradley*, 418 U.S. 717 (1974), and can that issue be raised here when it was not raised below?

Statement of the Case

Since the proceedings below and the District Court's decision are adequately summarized in the petition, this statement will be limited to facts concerning the right of the City petitioners to seek certiorari, and concerning the examination schools and vocational programs discussed in the petition (pp. 6-8). Like the petition, this brief will rely on the appendix to the petition for certiorari submitted by the School Committee in No. 74-1188, which will be cited as "App.".

The City petitioners were not among the parties in the District Court at the time of that Court's decision of June 21, 1974 (App. 37-38), and that Court's judgment and order (App. 174-75) did not specifically mention them. The City petitioners were not joined until September 6, 1974, more than 60 days after the court's June 21, 1974 judgment, and their joinder was limited to issues concerning school construction, public safety, security and finances

(petition, p. 2).[1] On appeal, the City petitioners filed no appearance, submitted no brief, and did not participate in oral argument. App. 1; appendix to this brief.

The challenge of the City petitioners to the application of *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973) by the lower courts relates only to the examination schools and vocational programs (petition, pp. 6-8), since the courts found the rest of the Boston school system unconstitutionally segregated without having to rely on the *Keyes* presumption (App. 140, 168).

The examination schools are three secondary schools whose composition in 1972-73 ranged from 2.2% black to 13.7% black (App. 139), the school system as a whole being at least 32% black (App. 56). Their faculties are also overwhelmingly white (App. 139). These schools offer excellent instruction and send graduates to the nation's finest colleges; they have been called elite schools (App. 139). Since they draw pupils from the whole city and two of them are in or near black residential areas, their racial composition is not attributable to any "neighborhood school policy" (App. 140-41). Advanced work classes which constituted "tracks" to the examination schools are 80% white and have been segregated by districting changes (App. 73 & n. 16). Until 1973, admission to these schools was based on examinations on which the success rates for whites was from twice to six times as large as for nonwhites (App. 141). As a result of Massachusetts Commission Against Discrimination proceedings under state law, however, the School Committee agreed that for three years starting with the 1973-74 school year it would base admissions on tests prepared by the Educational Test-

[1] The petition does not suggest that the City petitioners attempted, or were wrongly denied leave, to intervene for broader purposes such as an appeal from the June 21 decision. On the contrary, their joinder was involuntary and they had successfully resisted the School Committee's earlier attempt to join them.

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ing Service of Princeton, New Jersey, and reserve certain seats for students from under-represented districts of the city (App. 141-42). No evidence was presented as to the actual or expected impact of this change or the validity of the new tests as predictors of success in the examination schools.

The cooperative industrial programs are available at six district high schools, and likewise have (with one exception) predominantly white student bodies and faculties (App. 142, 144). Recruiting for these programs was focused on white junior high schools (App. 144). The programs were not available at three mainly black high schools to which the defendants had intentionally channelled black students (App. 100-01, 104, 144). The cooperative industrial programs offer on-the-job experience by which students earn an average of $1,800 per year and often keep their jobs after graduation (App. 143). That advantage is not available at Boston Trade, a mainly black vocational school in need of renovation (App. 139, 143-45), though students at Trade do have certain other opportunities (App. 143).

The lower courts found the examination schools and cooperative industrial programs to be unconstitutionally segregated on two grounds, both following *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973). First, both lower courts found (App. 24-25, 154-57) that no part of the Boston school system constituted a "separate, identifiable and unrelated" unit immune from the effects of discrimination elsewhere in the system. *Keyes,* 413 U.S. at 203. Second, they both found (App. 26, 140-45) that the defendants had failed to rebut the prima facie case of unconstitutional discrimination created by findings of substantial intentional segregation "at all grade levels and in all parts of the city" (App. 140) and the existence of

segregation in fact in these schools and programs. *Keyes,* 413 U.S. at 208-09, 211.

Argument

I. The City Petitioners Were Not Parties Below and Therefore Cannot Seek Certiorari.

Under 28 U.S.C. sec. 1254(1), only "any party" may seek certiorari. No one may petition who was not a party in the Court of Appeals, unless he is seeking review of an improper denial of intervention. *International Union, Local 283* v. *Scofield,* 382 U.S. 205, 208-09 (1965). Similarly, only a party — that is, a party to the judgment appealed from — can appeal from a District Court decision. *Payne* v. *Niles,* 20 How. (61 U.S.) 219 (1858); see *In re Leaf Tobacco Board of Trade,* 222 U.S. 578, 581 (1911); *Ex parte Jordan,* 94 U.S. 248, 252 (1877).

It is clear from the statement of facts above that the City petitioners are not parties in the requisite sense. They did not participate at all in the Court of Appeals (see appendix to this brief). They were not parties in the District Court at the time of the June 21, 1974 judgment (App. 37-38). They were not joined within the 30-day appeal period, or the 30-day extension allowed if the District Court grants leave under Fed. R. App. P. 4(a) (petition, p. 2). When they were joined, it was for limited purposes not including challenges to the Court's decision (petition, pp. 2, 13-14) — a limitation which would in any event have been implicit. See 3B Moore's Federal Practice ¶24.16. They did not seek wider joinder.

Since none of the City petitioners is a "party" within the meaning of 28 U.S.C. sec. 1254(1), the petition should be denied.

II. The Lower Courts Did Not Misapply the *Keyes* Presumption of Segregative Intent to the Examination Schools and Cooperative Industrial Programs.

The petition's contention that certiorari should be granted to review the application of the *Keyes* presumption of segregative intent to the examination schools and cooperative industrial programs is baseless, for several reasons.

1. The Court of Appeals' decision concerning these schools and programs was based not only on the presumption of segregative intent but also on an alternative ground. There are detailed findings in this case that the Boston school system contains *no* separate, identifiable, unrelated parts (App. 154-57). In *Keyes*, the Court made clear that — quite apart from the presumption of segregative intent — proof of state-imposed segregation in a substantial part of a district will suffice to support a finding of a dual system throughout the whole district except in "separate, identifiable and unrelated units." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 203, 213 (1973). This holding was based on the fact that the impacts and ramifications of segregative acts are most unlikely to be limited to the particular schools in which they occur. 413 U.S. at 201-03. Here, Chief Judge Coffin's opinion not only relied expressly on this ground (App. 24-25) to uphold the District Court's findings of unconstitutional segregation in the examination schools and vocational programs but specifically explained how the facts of this case, as they bear on these schools and programs, "illustrate the logic" of the *Keyes* holding (App. 25 n. 20).

2. Alternatively, reliance on the *Keyes* presumption of segregative intent was wholly proper. The District Court found major instances of intentional segregative acts throughout the school system amounting to "a systematic

program of segregation" (App. 170). These far outstripped the acts in 8 out of 119 schools relied on in *Keyes*, 413 U.S. at 191, 199 n. 10. See, e.g., App. 59-60, 63, 64-65, 79, 96-97, and 150. The *Keyes* presumption does not depend on any showing that the same methods were used to segregate throughout the system, but simply reflects the likelihood that a segregative design at work in one part of the system will also crop up elsewhere. *Keyes*, 413 U.S. at 208. The adoption of a modified admissions system for the examination schools on an experimental basis (App. 141-42), which the petition (p. 7) relies on, scarcely suffices to rebut the presumption of segregative intent, since it was accomplished by litigation under state law against the defendants (App. 141). Nor does it show that segregation resulting from prior practices had been removed root and branch (see *Keyes*, 413 U.S. at 211-12), since the examination schools were still segregated at the time of trial (App. 139).[2] A settlement in a state law proceeding brought by other parties is of course not binding on the plaintiffs-respondents here. *Cf. Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

The findings of the District Court and Court of Appeals concerning the presumption of intent in no way depended on the Court of Appeals' suggestion in a footnote that "little short of" a showing of integrative intent would rebut the presumption. App. 26 n. 21. The plain fact is, as the Court of Appeals stated (App. 26) that the defendants offered "no proof" of any kind whatever "that 'segrega-

[2] They are still segregated today. Data presented during recent remedial hearings in the District Court show that the 1974-75 enrollment of the examination schools ranges from 6.5% to 24.8% black. These figures include all grades, including those selected under the old system. Separate data for the two grades selected under the new system are available for two of the schools; those grades are 7.2% black in Boston Latin, and 11.4% black in Girls Latin. Plaintiffs' Requested Remedial Findings, p. 32 (3/3/75; citing evidence).

tive intent was not among the factors that motivated their actions' " (see *Keyes*, 413 U.S. at 210). "Quite the contrary, there is strong evidence to indicate that the segregation . . . was intentional." App. 26. This Court should not grant certiorari for the academic purpose of considering whether the very heavy burden described in *Keyes*, 413 U.S. at 210-211, was aptly summarized in dictum as requiring "little short of" proof of integrative intent.[3]

3. Even apart from the *Keyes* presumption and the inseparability of the school district, plaintiffs established a *prima facie* case that the examination schools were unconstitutionally segregated by showing (App. 73 & n. 16, 139-41) that they were segregated in fact, that they were "fed" by segregated, 80% white advanced work classes, that they admitted students on the basis of an examination in which the percentage of passing whites was two to six times the percentage of passing blacks, that their teaching staff was virtually all white, and that they offered educational opportunities unavailable elsewhere in the system. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971); see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-33 (1971); *Jones* v. *Georgia*, 389 U.S. 24 (1967). Plaintiffs raised this claim in both lower courts, and the defendants failed to rebut it by introducing evidence that either the old or the new admissions procedure had been validated, but neither lower court found it necessary to reach this ground of decision.

4. The application of *Keyes* to three schools and six vocational programs in a 200-school system does not, in

[3] The dictum was in any event a fair condensation of *Keyes*. Since the *Keyes* presumption can be rebutted only by showing that "segregative intent was not among the factors that motivated" school actions, and reliance on a "racially neutral explanation" does not suffice (413 U.S. at 210), a showing of integrative intent would usually be the only persuasive rebuttal.

the circumstances of this case, raise issues of sufficient importance to warrant certiorari. Certainly it does not warrant certiorari at this intermediate stage, when the specific final relief granted as to the examination schools and vocational programs is not before the Court. The lower courts relied on the *Keyes* presumption of segregative intent only in relation to these schools and programs, unconstitutional segregation elsewhere in the system having been directly proven (App. 168).

III. Milliken v. Bradley Did Not Overrule Keyes v. School Dist. No. 1.

The petition's claim (pp. 9-11) that *Milliken* v. *Bradley*, 418 U.S. 717 (1974) must be taken to have modified *Keyes* v. *School District No. 1*, 413 U.S. 198 (1973), as *Keyes* applies to this case, was not raised below by any party, or considered by the Court of Appeals. Such a claim is not ordinarily heard in the first instance here. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970). There was no lack of opportunity to raise it below. Although *Milliken* was decided after the District Court's decision in this case, it antedated the filing of briefs, argument and decision in the Court of Appeals (see appendix to this brief).

Far from overruling *Keyes'* treatment of the standards for proving *de jure* segregation *within* "a single autonomous school district" *Milliken* expressly confirmed and relied upon the *Keyes* reasoning. *Milliken*, 418 U.S. at 738 n. 18, 741 n. 19. Just what modes of inference are appropriate for interdistrict cases was not settled by *Milliken*. That case was not argued on the theory that *Keyes*-like presumptions should be used to show metropolitan-wide intentional segregation; rather, the Court rejected the claim that neighboring school districts should be drawn

in for the sake of remedial efficacy when there were no findings that unconstitutional state action had caused interdistrict segregation. 418 U.S. at 752. In any event, there is no inconsistency in recognizing presumptions arising from the existence of intentional segregation within a school district — where one set of officials is in charge and student assignment policies are directly interconnected — even though no identical presumption is recognized between districts. Nor is it inconsistent for a Court, in the administration of its equitable remedial powers, to recognize that the difficulties of judicially supervised governmental restructuring — totally absent from root-and-branch desegregation within a functioning district — call for a somewhat different approach to the question of desegregation across unit boundaries. *Milliken,* 418 U.S. at 743; *id.* at 754-55 (concurring opinion of Stewart, J.).

Even were there some latent conflicts between *Keyes* and *Milliken,* this case would be an inappropriate vehicle for addressing them because such conflicts have not surfaced here. The lower courts in this case have required the participation of all parts of the city in the desegregation remedy not just because they are all "part of the same jurisdiction" (Petition p. 10) but because of "detailed findings of intentional segregation of students and staff at all grade levels and in all parts of the city." (App. 140). The Petition's assertion (p. 10) that Boston's school system is "bizarre geographically" is belied by the proven operation of the segregated system, in which tens of thousands of students used transportation to attend schools throughout the city. (App. 55-56, 103, 116 n. 31, 152-57). The examination schools and vocational programs were city-wide (App. 54, 140-41, 156), and the *Keyes* presumption of segregative intent was relied on only as to these schools and programs (App. 168).

Conclusion

For these reasons, certiorari should be denied.

Respectfully submitted,

J. Harold Flannery,
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Laurence S. Fordham, John Leubsdorf,
(Foley, Hoag & Eliot);
Robert Pressman, Eric E. Van Loon,
(Center for Law and Education);
Rudolph F. Pierce,
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APPENDIX A

GENERAL DOCKET

United States Court of Appeals
For the First Circuit

Case No. 74-1251
TALLULAH MORGAN ET AL. *v.* JOHN J. KERRIGAN ET AL.

1974

Aug. 5 Record on appeal in one volume filed and case docketed.

8 Appearance of John O. Mirick for Appellant filed. Appearance of McMahon for intervenor Boston Teachers Union filed. Appearance of John Leubsdorf, J. Harold Flannery, Laurence S. Fordham, Robert Pressman, Eric E. Van Loon Thomas Simmons and Nathaniel R. Jones for plaintiffs, appellees filed.

9 Appearance of Sandra L. Lynch and Walter H. Mayo, III for Board of Education filed.

15 Appellants statement of issues and designation of record appendix filed. Motion to refer to certain exhibits without reproduction filed.

19 Motion filed. Order (Coffin, Ch. J.) granting leave to parties to refer to Plaintiff's exhibits 19, 20, 21, 23, and 24 without reproduction thereof in the appendix. Notices mailed.

21 Supplemental record on appeal consisting of two transcripts and one motion filed.

23 Appearance of Thomas Simmons for Appellee filed. Appearance of Roger Abrams for [sic]

26 Plaintiffs, Appellees' counterdesignations filed.

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26 Motion filed. Order (Coffin, Ch. J.) allowing joint motion concerning appendix. Notices mailed.

Sept. 4 Supplement to record consisting of twenty-eight volumes of transcript filed.

6 Motion filed. Order (Coffin, Ch. J.) enlarging time for appellant to file brief and appendix to and including Sept. 23, 1974. Notices mailed.

20 Motion filed. Order (Coffin, Ch. J.) granting leave to appellant to filed brief not in excess of 62 printed pages. Notices mailed. Appendix to briefs filed.

23 Appearance of Stephen H. Oleskey for appellants filed. Brief for appellant filed.

Oct. 10 Leave granting appellees to file a brief not in excess of (90) ninety pages. Notices mailed.

15 Brief for appellee filed. Supplemental appendix for appellee filed by leave of Court.

25 Assigned for hearing on November list.

Nov. 4 Heard before Coffin, Ch. J. McEntee & Campbell, JJ.

Dec. 19 Judgment: The order of the District Court is affirmed. Opinion by Coffin, Ch. J. Counsel notified.

31 Verified bill of costs filed.

1975

Jan. 16 Taxation of costs filed. Mandate issued, copy filed and original papers transferred to case No. 75-1001. Notices mailed.

Mar. 21 Notice of filing petition for certiorari (74-1188) filed 3/19/75.